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Supreme Court, U.S.
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No. 93-1433

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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APP

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER, JOHN E. GRAHAM & SONS

The recent opinion of this Court in *McDermott, Inc. v. AmClyde*[1] lays to rest a significant issue upon which the Petition for Writ of Certiorari of John E. Graham & Sons (Graham) is founded. In its Petition, Graham requests this Court revisit and explicate the reaffirmation of joint and several liability in maritime law announced in *Edmonds v. Compagnie Generale Transatlanrique*, 443 U.S. 256 (1979). The *McDermott* opinion has done so, at least to the extent that on the facts of this case a potentially dispositive issue has been resolved in Graham's favor.

Graham has argued, at every level, that the doctrine of joint and several liability cannot be used to cast a defendant in judgment for a co-defendant's liability when the co-defendant is dismissed because the plaintiff failed to timely prosecute the co-defendant.[2] The *only* reason the trial court dismissed the co-defendant, Grace Offshore Company, Inc. (Grace), was because the plaintiff, Kevin P. Bertrand, did not timely file suit against Grace. Nothing beyond Bertrand's control, such as insolvency or legislative tort immunity, deprived him of recovery against Grace. He merely slept on his rights.

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[1] No. 92-1479 (U.S. Apr. 20, 1994) (1994 WL 135219).

[2] At page 12 of the petition, Graham states:
[W]hen the harm from which joint and several liability protects the plaintiff is one solely a product of his own making, application of [joint and several liability] loses all validity.

In *McDermott*, this Court revisited *Edmonds* in response to the argument of the respondent that the proportionate share rule (calculation of a nonsettling defendant's liability based on its percentage of fault) was inconsistent with *Edmonds*. The *McDermott* opinion reads *Edmonds* as reaffirming joint and several liability, but then explicates the doctrine's application, stating:

> [Joint and several liability] can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than the innocent plaintiff, responsible for the shortfall.

Slip op. at 8.[3]

Joint and several liability protects plaintiffs from factors limiting their recovery that are beyond their control. The inequitable results engendered by the doctrine cannot otherwise be justified. The trial and appellate courts

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[3] Another consideration the *McDermott* opinion addresses that is applicable to this case is judicial economy. The burden imposed upon courts and litigants by ancillary contribution actions was a prime consideration for rejecting one of the three options advanced by the American Law Institute (pro tanto set off with right of contribution against the settling defendant) for calculating a nonsettling defendant's liability. *McDermott*, slip op. at 5. That burden applies with equal force to reject joint and several liability when use of the doctrine to protect a plaintiff whose recovery is limited by factors solely within his control unjustly results in a court having to entertain an anciliary contribution action.

did not recognize this limiting aspect of joint and several liability and cast Graham in judgment for Bertrand's damages caused by Grace.

The limits on joint and several liability command a different result. The trial court's dismissal of Grace because Bertrand failed to timely commence his cause of action against Grace is a limitation upon Bertrand's recovery that is solely the product of his own making. No outside forces can be blamed. Consequently, joint and several liability cannot be applied to hold Graham responsible for Bertrand's damages caused by Grace.

For these reasons and the reasons previously assigned in the Petition for Writ of Certiorari, Graham respectfully requests this Court grant the Petition.

Respectfully submitted,

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